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COURT OF CRIMINAL APPEALS
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No. PD-0309-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/15/2020
DEANA WILLIAMSON, CLERK

DARREN LAMONT BIGGERS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Cooke County, Trial Cause CR17-00073
No. 07-18-00375-CR

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STATE PROSECUTING ATTORNEY'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Darren Lamont Biggers.

* The trial judges were Hon. Janelle Haverkamp (voir dire) and Hon. Jim Hogan (guilt and punishment).

* Counsel for Appellant at trial were William and Ben Sullivant, Sullivant, Wright, & Brinkley, LLP, 209 South Dixon, Gainesville, Texas 76241.

* Counsel for Appellant on appeal was Jeromie Oney, Switzer Oney Attorneys at Law, P.O. Box 2040, Gainesville, Texas 76241.

* Counsel for the State at trial were Cooke County District Attorney John D. Warren and First Assistant District Attorney Eric Erlandson, 100 South Dixon, Gainesville, Texas 76240.

* Counsel for the State before the Court of Appeals was First Assistant District Attorney Eric Erlandson, 100 South Dixon, Gainesville, Texas 76240.

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* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Texas prohibits possession (without a prescription) of any mixture containing codeine. Possession of the lowest tier of codeine—Penalty Group 4 (PG-4)—also requires the mixture to be medicinal on its own, distinct from the codeine. Affirmative evidence that it isn't makes it PG-1. What happens when that fact isn't proven one way or the other and the offense charged is PG-4? The evidence should still be sufficient. The absurd alternative is to acquit the defendant because he is guiltier than the State alleged.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was indicted for possessing 400 grams or more of PG-4 codeine.[1] Appellant was tried before a jury on that charge and another not currently on review.[2] He was convicted and, after pleading true to two prior consecutive felony convictions, was sentenced to 60 years' confinement.[3] The court of appeals found the evidence insufficient and rendered a judgment of acquittal.[4]

ISSUE GRANTED

> When the State alleges, but fails to prove, the codeine mixture the defendant possessed contains a sufficient proportion of another medicine to be medicinal, should he be acquitted?

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[1] The amended indictment can be found in the reporter's record at 8 RR 101 (DX 1). Only the original indictment is included the clerk's record, and it does not indicate what penalty group the codeine is alleged to be in. CR 5. But the rest of the record reveals that the indictment was amended to allege PG-4 codeine, following the defense's request for specification. 3 RR 34, 114 (voir dire); 4 RR 140 (amended indictment admitted at trial); 5 RR 7 (amendment was at defense request), 60 (closing argument).

[2] 3 RR 113-14. The other charge was tampering with evidence.

[3] CR 17, 20; 5 RR 88 (guilty verdict); 6 RR 7 (plea of true); 6 RR 38 (punishment verdict). TEX. HEALTH & SAFETY CODE § 481.118(e) (5-99 years or life for possession of 400g or more of a Penalty Group 4 substance); TEX. PENAL CODE § 12.42(d).

[4] *Biggers v. State*, 601 S.W.3d 369, 380 (Tex. App.—Amarillo 2020, pet. granted).

THE STATUTES INVOLVED

Codeine is a narcotic. It is classified in three penalty groups, tiered like the federal drug schedules for codeine, based on increasing risk and danger of addiction and abuse.[5] The lowest tier, PG-4, consists of:

> a compound, mixture, or preparation containing limited quantities of ["not more than 200 milligrams of codeine per 100 milliliters or per 100 grams"] that includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the [codeine] alone.[6]

This definition sets out two components: a codeine concentration (200mg/100mL or below) and a non-narcotic that also makes the mixture medicinal ("medicinal-effect requirement"). Typically, PG-4 codeine is codeine cough syrup.[7]

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[5] 21 U.S.C. § 812(b).

[6] TEX. HEALTH & SAFETY CODE § 481.105. This is the same language as in federal Schedule V. 21 C.F.R. § 1308.15(c)(1). Even though this codeine mixture is a Schedule V drug, federal law, unlike Texas, does not require a prescription for it. 21 C.F.R. § 290.1 (general requirement of prescription), 290.2 (exemption for this compound); *see also* Amendment of Regulations Regarding Certain Label Statements on Prescription Drugs, 65 FR 18934-01, 2000 WL 357336, April 10, 2000 ("Small amounts of codeine in combination with other nonnarcotic active medicinal ingredients, for example, cough syrup with codeine, may be marketed OTC under a final monograph for cold and cough products."). While the Federal Food, Drug, and Cosmetic Act generally pre-empts state law, it does not do so for state laws that require a prescription. 21 U.S.C. § 379r(c)(1)(B). Texas requires such a prescription for Schedule V-codeine containing 200mg or less of codeine. TEX. HEALTH & SAFETY CODE § 481.074(i).

[7] *Miles v. State*, 357 S.W.3d 629, 636-37 (Tex. Crim. App. 2011).

The middle-tier, PG-3, sets out a higher codeine concentration and a requirement that the non-narcotic be at therapeutic levels:

> a material, compound, mixture, or preparation containing limited quantities of . . . not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;[8]

Tylenol with codeine #3 and #4 tablets fall within this tier.[9]

PG-1 is the remainder:

> a salt, compound, derivative, or preparation of opium or opiate, other than thebaine derived butorphanol, nalmefene and its salts, naloxone and its salts, and naltrexone and its salts, but including . . . Codeine not listed in Penalty Group 3 or 4[.][10]

As a result of this scheme, all forms of codeine possession without a prescription are prohibited. The range of punishments for these offenses depend, as with other

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[8] TEX. HEALTH & SAFETY CODE § 481.104(a)(4). Presumably there is a difference between "valuable medicinal qualities" and "recognized therapeutic amounts" since each has different language. Most likely all recognized therapeutic amounts would also confer valuable medicinal qualities, but perhaps a drug might fail the test for the former and still be said to confer "valuable medicinal qualities" because, even at less than prescribed levels, it has not been rendered chemically inert.

[9] *Miles*, 357 S.W.3d at 640 (Cochran, J., concurring).

[10] TEX. HEALTH & SAFETY CODE § 481.102(3)(A). This generally corresponds to the federal Schedule II drug, which similarly excepts out substances that are "listed in another schedule." 21 C.F.R. § 1308.12(b), (b)(1)(i). As compared to Schedule III or V drugs, Schedule II drugs have a higher potential for abuse and their abuse may lead to severe psychological or physical dependence. 21 U.S.C. § 812(b)(1).

controlled substances, on (1) whether the mixture is delivered or merely possessed, and (2) its weight, including adulterants and dilutants.[11] But the beginning punishment ranges for PG-1 codeine, which is in the same penalty group as heroin, rise more steeply:

Weight	**PG-1**[12]	**PG-3**[13]	**PG-4**[14]
< 1g	state jail	Class A	Class B
1g to < 4g	3rd degree	Class A	Class B
4g to <200g	2nd degree	<28g Class A 28 to <200g 3rd Degree	<28g Class B 28 to <200g 3rd Degree
200g to <400g	1st degree	2nd degree	2nd degree
400+g	10-99 or life $100k fine	5-99 or life $50k fine	5-99 or life $50k fine

[11] TEX. HEALTH & SAFETY CODE §§ 481.114 (prohibiting manufacturer or delivery of PG-3 or 4), 481.115 (prohibiting possession of PG-1 substance without a prescription), 481.117 (same for PG-3 substance), 481.118 (same for PG-4 substance).

[12] *Id*. § 481.115.

[13] *Id*. § 481.117.

[14] *Id*. § 481.118.

SANCHEZ & MILES

This case must be considered against the backdrop of two opinions from this Court. As here, the State in *Sanchez v. State* charged PG-4 codeine possession and offered evidence that promethazine was present in the mixture in an unquantified proportion.[15] A majority of this Court found the evidence sufficient based on the particular record before it—the analyst testified that the promethazine added a "valuable medicinal quality."[16] In concurrence, Presiding Judge Keller and three other judges concluded Sanchez could not win for an additional reason: if the promethazine was not in the proper proportion, he "would be guilty of a *greater* offense—i.e., [PG-1 possession]."[17] In her concurrence, Judge Johnson agreed: the State's failure of proof accrued to Sanchez's benefit.[18]

About three years later, this Court considered *Miles*, another unquantified promethazine case.[19] There, the Court first had to resolve what offense Miles was being tried for—PG-1 or PG-4 codeine.[20] The Court held it was PG-1 and found the

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[15] 275 S.W.3d 901 (Tex. Crim. App. 2009).

[16] 275 S.W.3d at 905.

[17] *Id*. at 906 (Keller, P.J., concurring) (emphasis in original).

[18] *Id*. at 907-08 (Johnson, J., concurring).

[19] 357 S.W.3d at 629.

[20] *Id*. at 631.

evidence insufficient. Because an essential element of PG-1 codeine is that the codeine is "not listed in Penalty Group 3 or 4," the State had to *disprove* the therapeutic or medicinal value of the promethazine in the mixture.[21] Without evidence to infer these qualities one way or the other, Miles could not be convicted of PG-1 possession.[22] The majority did not consider reformation to a PG-4 offense; that lesser had not been requested and *Bowen v. State*, which scrapped the request requirement, had not been decided.[23]

In dissent, P.J. Keller pointed out that five judges in *Sanchez* (4 joining her concurrence and Judge Johnson) agreed that the non-narcotic's medicinal effect need not be proven for PG-4 possession.[24] Judge Cochran had formed part of that majority but stated in her *Miles* concurrence that she agreed only that a PG-4 offense did not require quantification.[25] For her, alleging and proving promethazine's medicinal effect on the mixture was still required.[26]

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[21] *Id*. at 638.

[22] *Id.*

[23] *Miles*, 357 S.W.3d at 633 n.13 (majority), 645 (Keller, P.J., dissenting); *see Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012).

[24] *Miles*, 357 S.W.3d at 644-45 (Keller, P.J., dissenting); *Sanchez*, 275 S.W.3d at 905 (Keller, P.J., concurring), 907 (Johnson, J., concurring).

[25] *Miles*, 357 S.W.3d at 639, 642 n.12 (Cochran, J., concurring).

[26] *Id*.

STATEMENT OF FACTS

An arrestee hoping to help his own drug case volunteered to set up a methamphetamine purchase from Appellant at a dollar store.[27] When Appellant arrived, the informant pointed him out to police, who then stopped the car he was in and ordered him and the driver out.[28] Although police did not find methamphetamine, they did find a Styrofoam cup and Sprite bottle containing a purple liquid in the car.[29] Police believed it was "lean," a drink containing codeine and cough syrup mixed with Sprite, juice, or something similar.[30] When asked who the "lean" belonged to, Appellant first said he had a prescription and then said it was over-the-counter Robitussin made to look like lean.[31] It field-tested positive for

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[27] 4 RR 26-27, 177-78, 184-85, 190-93; 5 RR 38-39; SX 2-1.mp3 (recorded phone call); SX-3.

[28] 4 RR 35, 50-54, 74-77.

[29] 4 RR 78-79.

[30] *Id*. "Lean is so named because of the effect it has on people while drinking–they tend to slouch or *lean* to one side the more they consume." Destiny Bezrutczyk, "What is a Lean Addiction?" addiction.center.com (Dec. 2019) (emphasis in original) (available online at https://www.addictioncenter.com/opiates/codeine/lean-addiction-abuse/) (last visited Oct. 14, 2020). The reason it is sometimes mixed with soft drinks or other sweeteners may be because, as one user explained, "you can't drink it straight; it tastes nasty!" "Leaning on syrup: The misuse of opioid cough syrup in Houston," Texas Commission on Alcohol and Drug Abuse, p.11 (Dec. 1999) (available online as of Oct. 14, 2020, at: https://socialwork.utexas.edu/dl/files/cswr/institutes/ari/pdf/sippingonsyrup.pdf).

[31] 4 RR 80-81.

codeine.[32] Later, in a jail phone call admitted at trial, Appellant admitted to having a "cup of lean" and "a Sprite …with some lean in it."[33]

Appellant was indicted for:

> intentionally and knowingly possess[ing] a Penalty Group 4 controlled substance, namely, a compound, mixture or preparation in an amount of 400 grams or more, that contained not more than 200 milligrams of codeine per 100 milliliters or 100 grams and one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone.[34]

The analyst's testimony

At trial, the lab analyst testified that codeine and promethazine were both present in the seized liquids, but she did not determine (nor was she asked to determine) how much of each was present.[35] She identified promethazine as an antihistamine and non-narcotic, active medicinal ingredient.[36] The liquids smelled

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[32] 4 RR 82, 104.

[33] 4 RR 157; SX 12-2 at 4:34; SX 13 at 8 RR 34 (demonstrative transcript).

[34] DX 1.

[35] 4 RR 121, 138-40, 142; SX 9 (lab report).

[36] 4 RR 123, 134-35, 141.

like cough syrup,[37] and the analyst noted that codeine and promethazine are often paired in cough syrups.[38]

As to whether there was enough of the promethazine to have some medicinal effect on the mixture as a whole, she could only testify that it appeared to and that she assumed it was there for a reason.[39] When asked again, she agreed that she was not in a position to say whether there was a medicinal quantity of promethazine in the mixture.[40]

On cross-examination, the defense established that cough syrup was not necessarily the source of the codeine and promethazine in the mixture.[41] The analyst agreed with defense counsel that both promethazine and codeine exist in a pure form available to chemists and doctors and thus the mixture may not have come from a medicine bottle at all.[42] It could have been "mixed up" by someone other than a drug manufacturer.[43]

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[37] 4 RR 120, 132-34, 142.

[38] 4 RR 123, 135.

[39] 4 RR 136.

[40] 4 RR 139, 141.

[41] 4 RR 142-43.

[42] *Id*.

[43] 4 RR 143.

The parties' arguments

Consistent with its cross-examination, the defense moved for a directed verdict based on lack of proof that the promethazine was in the sufficient proportion.[44] This was denied.[45] Before the jury, the defense also contended that since the analyst failed to quantify the substances, the State failed to prove the concentration of the codeine was less than 200 mg/100 mL.[46] The State argued it was ridiculous to acquit Appellant for believing he may have had a purer, higher-penalty form of codeine.[47]

Appellant was convicted of the first-degree-felony offense of possession of 400 or more grams of PG-4 codeine and was sentenced as a habitual offender to 60 years' confinement.[48]

The court of appeals

In its opinion, the court of appeals said:

> Based on this record, Appellant asserts the evidence presented was insufficient because the State was unable to provide any testimony

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[44] 5 RR 5-7.

[45] 5 RR 13.

[46] 5 RR 61-63.

[47] 5 RR 75-76.

[48] CR 17, 20; 5 RR 88 (guilty verdict); 6 RR 7 (plea of true), 38 (punishment verdict). TEX. HEALTH & SAFETY CODE § 481.118(e); TEX. PENAL CODE § 12.42(d).

> establishing an essential element of the State's case, namely the level of concentration of codeine in the substances possessed by Appellant. Furthermore, Appellant contends the evidence was insufficient because the State only established the mere presence of promethazine, rather than the presence of promethazine in a sufficient proportion to the whole to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine alone. We agree.[49]

It is unclear whether the court's agreement was just with the last claim or also with the first. There is doubt as to the first claim because the Court also noted that the mere presence of codeine in a mixture "presumptively contains at least 'not more than 200 milligrams of codeine per 100 milliliters'" and thus would not render the evidence insufficient.[50] But it continuously held that the State's failure to prove a sufficient proportion of promethazine to convey valuable medicinal qualities required an acquittal.[51]

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[49] *Biggers*, 601 S.W.3d at 376.

[50] *Id.* n.10 ("A compound, mixture, or preparation containing the mere presence of codeine, presumptively contains *at least* 'not more than 200 milligrams of codeine per 100 milliliters.' While the compound, mixture or preparation might also contain *more* than 200 milligrams of codeine per 100 milliliters, as to that element of the offense, the evidence is <u>not</u> insufficient if it merely establishes the presence of codeine in a substance alleged to be a Penalty Group 4 controlled substance.") (all emphasis in original). The analyst testified that a higher concentration than PG-4 codeine's maximum threshold would make the mixture a higher penalty group. 4 RR 140-41, 146-47.

[51] *Biggers,* 601 S.W.3d at 377-78.

SUMMARY OF THE ARGUMENT

When the State alleges the lowest level in a set of tiered offenses but proves a greater level, the evidence will not be insufficient to prove the charge offense. This is because proof of the greater suffices for proof of the lesser. But it is also true that the evidence is not insufficient if there is ambiguity about whether the defendant committed the greater offense or just the charged one. For example, the State's failure to prove the precise value of stolen property in a Class C theft or the exact amount of narcotics in a state-jail-felony possession does not matter because the only two possibilities (the defendant is guilty of the charged offense or an even greater one) both suffice.

Codeine possession functions in a similar way because PG-1 codeine's definition is "codeine not listed in Penalty Group 3 or 4." *Miles* held that because of this definition, PG-4's "valuable medicinal qualities" language functions as an element to negate for PG-1 codeine. Despite its placement in PG-4, it should *only* affect PG-1. This is because PG-1's definition creates a comprehensive set of offenses. When the State alleges the lowest tier and fails to prove this medicinal quality, the only remaining possibility—that it was not derived from cough medicine and thus is potentially more dangerous—would only establish a higher penalty

group. Because acquittal on these facts is absurd, this additional language should not be interpreted as an element of PG-4.

ARGUMENT

Codeine Concentration: Proving there is codeine in the solution constitutes proof of at least PG-4 strength codeine.

To the extent the court of appeals found the evidence insufficient to show the codeine concentration was less than 200 mg/100 mL, its decision should be reversed. As the court of appeals's footnote recognized, detection of codeine in the specimen should suffice to prove § 481.105's requirement of "not more than" 200 mg/100mL—or any maximum threshold. The theft statute has a similar structure. Many rungs of the punishment value ladder purportedly require the stolen property to be valued "less than" a certain dollar figure.[52] The lowest tier, Class C misdemeanor theft, for instance, requires the property to be "less than $100." But the thief on trial for a Class C misdemeanor should not be acquitted if the State fails to prove whether it falls below that threshold.[53] Nor should the lowest-level drug

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[52] TEX. PENAL CODE § 31.03 (Class C if value stolen is "less than $100); Class B if "less than $750"; Class A if "less than $2,500"; etc.); *see Nitcholas v. State*, 524 S.W.2d 689, 691 n.1 (Tex. Crim. App. 1975) (proof of second-degree-felony-value of theft would support indictment for third-degree-felony).

[53] *See Winkley v. State*, 123 S.W.3d 707, 714 (Tex. App.—Austin 2003, no pet.) (reforming theft of a hay dolly to Class C misdemeanor theft despite no proof of dolly's value).

possessor be acquitted if he may have possessed more.[54] Or the defendant accused of an attempted offense be acquitted if he actually completes it.[55] As a matter of logic and law, proof of more than is required is legally sufficient evidence.[56] Further, even when the State fails to prove one way or the other if the defendant may have done more, stolen more, possessed more, caused greater injury, or possessed a purer

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[54] *See Stockton v. State*, 756 S.W.2d 873, 876 (Tex. App.—Austin 1988, no pet.) ("the amount of controlled substance need not be proved to sustain a conviction for the lowest punishment class."); *see also Crumpton v. State*, 301 S.W.3d 663, 664 (Tex. Crim. App. 2009) (jury's finding of homicide necessarily means defendant used something "capable of causing death" since, in fact, it did cause death).

[55] Even before the 1974 Penal Code clarified in § 15.01(c) that proof of a consummated offense should not result in an acquittal when the charged offense was only an attempt, this Court held that to be the law. *Flores v. State*, 472 S.W.2d 146, 148 (Tex. Crim. App. 1971) (citing *State v. Mathis*, 221 A.2d 529, 533 (N.J. 1966)); *Nielson v. State*, 437 S.W.2d 862, 866 (Tex. Crim. App. 1969) ("What sensible end can be served by the bald proposition that when the indictment alleges only an 'attempt' there must be an acquittal if the evidence shows the accused went further than the State charged.") ("The fact that an accused is guilty of a higher offense than alleged should be no defense, and it should not be open to him to object that he has not been indicted for the greater offense.").

[56] *Wasylina v. State*, 275 S.W.3d 908, 910 (Tex. Crim. App. 2009) ("If the State proves the charged offense, it necessarily proves all lesser-included offenses."); *Daniel v. State*, 668 S.W.2d 390, 394 (Tex. Crim. App. 1984) ("Proof of a greater offense will sustain a conviction for a lesser included offense."). *See also* TEX. PENAL CODE § 6.02(e) ("Proof of a higher degree of culpability [culpable mental state] than that charged constitutes proof of the culpability charged."). One state statute authorizes suspension of trial and remand for prosecution of the greater. *See* ARIZ. REV. STAT. § 13-3984 ("If upon the trial of any action it appears to the court by the testimony that the facts proved constitute an offense of a higher nature than that charged, the court may direct that the jury be discharged and all proceedings on the indictment or information suspended, and may order the commitment of the defendant . . . to answer any indictment which may be returned….").

form of codeine, that possibility should not result in an acquittal.

Medicinal Effect: Because lack of medicinal effect is an element of PG-1, failure to prove medicinal effect shouldn't result in an acquittal for PG-4.

In some ways, the medicinal-effect requirement looks like it might be an element the State has to prove for PG-4 codeine. It is located within the Penalty Group 4 listing (§ 481.105), and, much like with a definition, the two offenses that criminalize PG-4 substances (manufacture/delivery and possession) refer back to this listing.[57] Usually, when a lesser offense in a tiered structure requires an extra fact not required of the assumed greater, that extra fact eliminates the possibility that the two are related as greater-and-lesser subsumed offenses. They are treated as different offenses with different requirements, and a failure to prove one of those requirements would justifiably result in acquittal.

But the structure of the codeine prohibition scheme has an usual feature that produces a similar effect to tiered offenses. PG-1 is defined as not PG-3 or PG-4. So as *Miles* held and as this definition requires, proof of a non-narcotic active ingredient

[57] TEX. HEALTH & SAFETY CODE §§ 481.114(a) ("a person commits an offense if the person knowingly manufacturers, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group…4."), 481.118(a) ("a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 4.")

that *lacks* therapeutic or medicinal effect means the substance is PG-1 codeine.[58] In essence, the language in PG-4 functions as an element to negate for PG-1 codeine, at least when there is another active ingredient in the mixture.

It should do no more. Where both codeine and promethazine are detected and the State fails to prove whether the promethazine has a medicinal effect, there are only two possibilities. The promethazine either has medicinal effect, in which case it's a PG-4 substance, or it doesn't, in which case, it's worse. There is no "no-man's land" in the middle where codeine with promethazine is not prohibited and where Appellant is not guilty.[59] This was essentially the argument of the two concurrences to *Sanchez*,[60] and if it did not form a majority before,[61] it should now.

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[58] *Miles*, 357 S.W.3d at 641.

[59] Courts in other states that, like Texas, follow the federal drug schedules also treat Schedule-V-codeine's "sufficient proportion to confer …valuable medicinal qualities" language as a non-element. *See Evans v. State*, 766 S.E.2d 821, 825 (Ga. Ct. App. 2014) (rejecting defense request to submit an instruction that tracked definition of Schedule V codeine as alleged in the indictment because it was not a defense to codeine possession); *People v. Valdez*, 56 P.3d 1148, 1152 (Colo. App. 2002) (finding evidence insufficient to prove higher penalty group but not Schedule V); *but see People v. Jones*, 425 N.E.2d 1279, 1283 (Ill. App. Ct. 1981) (finding presence of codeine alone was insufficient to prove Schedule V codeine possession).

[60] *Sanchez*, 275 S.W.3d at 906 (Keller, P.J., concurring with 3 additional judges), 907 (Johnson, J., concurring).

[61] *See Miles*, 357 S.W.3d at 645 (Keller, P.J., dissenting) (arguing that *Sanchez* concurrences already formed majority and "at least arguably, binding precedent").

Absurdity, lenity, and the hypothetically correct charge.

Interpreting § 481.105 as the court of appeals did leads to the absurd argument "acquit me because I'm even guiltier than the State alleged." As a result, this is not a situation of doubt between two equally plausible interpretations where the rule of lenity—even if it were applicable to the Controlled Substances Act[62]—should dictate the result.[63]

Furthermore, nothing about reframing the medicinal quality requirement only as an element to negate for PG-1 is absurd. The defense in this case suggested bad actors with access to pure sources of promethazine and codeine (rather than commercially produced codeine cough medicine) may have concocted the mixture.[64] And it is possible that there was only a token sprinkling of promethazine. But that possibility does not weigh in favor of acquittal. Instead, it justifies the treatment of such concoctions—which are not bona fide medicines in their own right—as a higher penalty group than PG-3 and PG-4, which serve a legitimate medical purpose.

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[62] TEX. GOV'T CODE § 311.035(c) (rule of lenity in Code Construction Act does not apply to criminal offense or penalty under Texas Controlled Substances Act).

[63] *See Diruzzo v. State*, 581 S.W.3d 788, 802 n.22 (Tex. Crim. App. 2019) ("The rule of lenity provides the rule of decision when the proper construction of a statute is in insoluble doubt") (citing *Ex parte Forward*, 258 S.W.3d 151, 154 n.19 (Tex. Crim. App. 2007)).

[64] 4 RR 39-43.

Similarly, concoctions that began as bona fide medicines but were tampered with to enhance their abuse potential also warrant treatment as PG-1 substances.[65] It doesn't make sense to acquit a defendant based on these possibilities.

Also, if, as argued above, this Court interprets § 481.105 as setting out what to disprove for PG-1, rather than an element of PG-4, the State's allegation of that language in its indictment will make no difference. While the State ordinarily has to prove what it alleges, especially when it is statutory language,[66] the sufficiency of

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[65] *See* Andreas Kimergard, et al., "How Resistant to Tampering are Codeine Containing Analgesics on the Market? Assessing the Potential for Opioid Extraction," *Pain and Therapy,* vol. 5, 2 (2016): p.187-201 (last visited Oct. 14, 2020, and available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5130903/) ("[T]ampering procedures which separate codeine from the accompanying analgesics appears to be gaining popularity amongst certain codeine taking populations, particularly in Internet savvy users. Often referred to as 'cold water extraction', the aim is to keep as much codeine as possible in the extracted tampering products, while at the same time reducing the amount of non-opioid analgesics to non-toxic levels.") ("Tampering of codeine appeals to recreational users consuming high amounts of codeine to induce opioid euphoria, to codeine dependent concerned with the toxicity of non-opioid analgesics, and to those unable to obtain potent prescription opioids who may turn to codeine to prevent withdrawal and cravings. . . . Tampering of codeine combination analgesics allows for consumption of high doses of codeine without consuming toxic doses of accompanying non-opioid analgesics."); Marie Claire Van Hout, "Kitchen chemistry: A scoping review of the diversionary use of pharmaceuticals for non-medicinal use and home production of drug solutions," *Drug Testing and Analysis* (2014). ("Another trend in the non-medicinal use of codeine cough syrups is the homemade drug solution produced from a mixture of paint solvent (naphtha with ammonia) or lighter fluid with the codeine cough syrup, and produced so as to extract the dextromethorphan. The resultant solution is then mixed with lemon juice or powdered lemonade mix and called 'Lemon Drop'.").

[66] *Johnson v. State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012).

the evidence is measured against the hypothetically correct jury charge, and that charge requires an accurate statement of the law.[67] If medicinal effect does not function as an element for PG-4 possession, alleging that language cannot make it an element merely by virtue of the State having alleged it or Appellant's having relied upon it.[68] Importantly, the State is not attempting to shore up its evidentiary deficiencies by switching horses mid-stream. It is not attempting to prove a different manner of codeine possession than the statutory alternative that it chose. The State alleged PG-4 and proved it was at least PG-4. It is content with a PG-4 conviction.

Conclusion.

As several of this Court's judges have already observed, the State's failure to prove the mixture was medicinal without the codeine results in only one possibility other than guilt of the charged offense—Appellant is even guiltier than alleged. This is an inescapable consequence of PG-1's definition as "not PG-3 or PG-4." Because acquittal under those circumstances is absurd, the medicinal effect language in § 481.105 should not also function as an element of PG-4 offenses.

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[67] *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

[68] *Compare Geick v. State*, 349 S.W.3d 542, 548 (Tex. Crim. App. 2011) (requiring State to stick with statutory manner and means it alleged rather than relying on proof of unalleged alternative for a conviction).

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm Appellant's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 4,608 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of October 2020, the State's Petition for Discretionary Review was served electronically on the parties below.

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